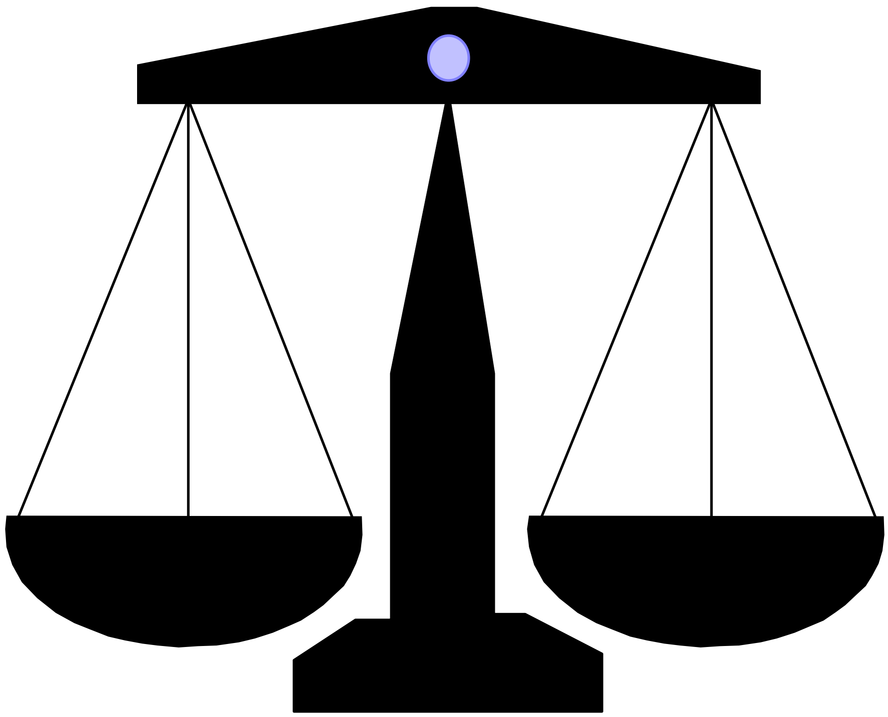
Legislative Acquiescence and Payday Lenders:

Distinguishing *Indiana Bell Telephone Co., Inc. v. Indiana Utility Regulatory Com'n*, 715 N.E.2d 351 (Ind. 1999).



Phil Goddard
Chief Counsel and Deputy Director

Christopher McKay
Legal Assistant and Research Analyst

June 2000

Issue: Whether the Supreme Court of Indiana's holding in *Indiana Bell Telephone Co., Inc. v. Indiana Utility Regulatory Com'n* has any bearing on the Department's administrative interpretation of payday loans.

Answer: No.

In *Indiana Bell Telephone Co., Inc. v. Indiana Utility Regulatory Com'n*[1], the Supreme Court of Indiana found that the Indiana Utility Regulatory Commission's (Commission) long adhered to administrative interpretation raised a presumption of legislative acquiescence which was strongly persuasive upon the Court.[2] This doctrine of legislative acquiescence raises the question of whether the Department of Financial Institutions' (Department) silence regarding payday lenders now bars the application of the thirty-six percent rate ceiling for supervised loans[3] as well as the loansharking statute[4] against them.

The most obvious difference between these situations is the amount of time that has passed before the policy change. Where the Commission adhered to its administrative interpretation for decades, the Department's stance towards payday lenders goes back only to 1994 when the first lenders opened shop in Indiana. As the Court stated in examining the Commission's attempt to characterize Ameritech as a public utility as defined by IC 8-1-2-1[5], "If we were writing on a clean slate, inclusion of 'control' in this definition might be fairly interpreted to include among 'public utility' anyone who has control of a public utility by ownership of voting stock or otherwise. A very sizeable body of precedent points in the other direction however, and finding holding companies to be public utilities would effect a major change in relatively settled doctrine."[6]

Due to the previous administrative interpretation of the Commission that holding companies which own Indiana utilities are **not** public utilities themselves, the Court noted that the proposed change would lead to a vast number of violations having been committed over the years in full

[1] 715 N.E.2d 351 (Ind. 1999).
[2] Id., at 358, *citing* Shell Oil Co. v. Meyer, 705 N.E.2d 962, 976 (Ind. 1998), *quoting* Board of Sch. Trustees v. Marion Teachers Ass'n, 530 N.E.2d 309, 311 (Ind. Ct. App. 1988).
[3] IC 24-4.5-3-508(2)
[4] IC 35-45-7-2.
[5] A corporation, company, partnership, limited liability company, individual, association of individuals, their lessees, trustees, or receivers appointed by a court, that may own, operate, manage, or control any plant or equipment within the state for the conveyance of telegraph or telephone messages….
[6] Id., at 355.

view of the Commission. As stated, "The deafening silence that attended these events can only confirm the common understanding that holding companies are not themselves public utilities as defined by statute. Whether they should be subject to a higher degree of regulation is of course another matter, but it is for consideration by the General Assembly, not this Court or the Commission."[7] Essentially, the acquiescence of the Commission, the courts, and the General Assembly to the long-held view that holding companies were not public utilities meant that any change from that interpretation could only come from an affirmative action of the legislature.

In contrast, the Department has never been called upon to make a determination as to the status of payday loans in Indiana. The issuance of a license to operate within the state is not a written directive from the Department allowing a lender to ignore either usury ceilings for consumer loans or criminal usury statutes. Even if a license constituted an implied waiver, lenders cannot assert an equitable defense, such as *laches* because they do not have clean hands in the matter. The commission of a felony by making a usurious loan should bar any lender from asserting that the Department, the courts, and the General Assembly implicitly acquiesced to the circumvention of the loansharking statute.

The Court also looked at the legislative history of the act in order to confirm that a conscious decision was made not to include holding companies in the definition of public utility. The statute in question has been in existence since 1913. After its enaction, there were calls to amend the definition of public utility to give the Commission investigatory power over holding companies as well. Bills introduced in 1925, 1929, and 1931 to do just that failed.[8] In 1933, the Act was amended to give the Commission the power to investigate a public utility's affiliates, which the Court viewed as a compromise bringing holding companies under limited scrutiny of the Commission without subjecting them to all the requirements imposed on a public utility.[9] The Court also agreed that section 49 "reflects a continued legislative choice to use indirect, rather than direct, regulation of holding companies."[10]

This holding is in keeping with the Commission's first interpretation of section 83(a) in 1924 that it did not

---

[7] Id.
[8] Id., at 357.
[9] Id.
[10] Id.

confer jurisdiction over a holding company.[11] The Commission reiterated this interpretation as recently as 1990 stating, "We conclude that stock ownership alone is not sufficient to place [a shareholder] within the ambit of public utility regulation."[12] Even though the Commission pointed to several more recent cases where it approved transactions involving holding companies, the Court noted that approval was sought voluntarily and the question of jurisdiction was neither contested nor litigated.[13] In these cases, voluntary submission to jurisdiction had no bearing on the Commission's statutory jurisdiction.

These same facts are not present in the Department's scrutiny of payday lenders. The legislature is presumed to have intended the language used in a statute to be applied logically and not to bring about an unjust or absurd result.[14] There is a significant difference between an administrative interpretation that is adhered to for approximately seventy-five years, as with the Commission, and the evolution of regulatory oversight by the Department over the course of eight years.

It is patently absurd to assume that the General Assembly amended IC 24-4.5-3-508(7), authorizing a minimum finance charge, with the intention of granting immunity from usury ceilings set out previously in the same section, much less the criminal usury rates that are tied to them. This type of lender was not even contemplated at the time the amount of the minimum loan finance charge was raised to thirty dollars in 1992. The General Assembly could not grant immunity or an exemption to a business it had never heard of and that did not exist in the state. As stated in *Hamilton v. York*, "Surely the…legislature did not intend for businesses to be able to 'get around' the usury statute and charge exorbitant interest rates by simply obtaining a…license. However, if this is what the legislature wanted, it will have to clarify its intentions."[15] A good example of clarified intentions is Indiana's pawnshop statute[16] in which a **specific exemption** to the rate in the loansharking statute is set out.

Without further clarification along these lines from the General Assembly, the Department is charged with the

[11] *Id., quoting In re Madison Light & Power Co.*, 1924C Pub. Util. Rep. (PUR) 517, 519 (IPSC 1924).
[12] *In re Dalecarlia Utility Corp.*, No. 38827, 199 Ind. PUC LEXIS 114 at *4 (IURC Apr. 11, 1990).
[13] *Indana Utility Regulatory Com'n*, at 358, *citing In re Rochester Tel. Corp.*, No. 40099, 1995 Ind. PUC LEXIS 40 (IURC Feb. 8, 1995); *In re Frontier Corp.*, No. 40205, 1995 Ind., 1995 WL 735627 (IURC July 12, 1995).
[14] *Sales v. State*, 723 N.E.2d 416, 420 (Ind. 2000), *citing Riley v. State*, 711 N.E.2d 489, 495 (Ind. 1999).
[15] 987 F.Supp. 953 (E.D. Kentucky, 1997).
[16] IC 28-7-5-28.5.

duty to make regulations based upon its statutory grant of administrative power in this area. A court cannot presume that the legislature intended a statute be applied in an illogical manner or contain useless provisions whose affect could have been easily avoided.[17] In addition, courts may not construe statutes in a way that impairs the function the legislature intended it to possess.[18]

Where there is substantial evidence of probative value to sustain its findings or actions, courts will not upset the action of an administrative agency acting within the scope of its jurisdiction.[19] While there is ample evidence to support the Department's interpretation of the supervised lender usury ceilings and the loansharking statute, there is nothing that even comes close to the seventy-five years of legislative acquiescence that can be found in the *IURC* case. Although penal statutes are strictly construed against the State, such construction should not exclude cases the statutes fairly cover.[20] To narrow the construction of the usury ceilings and loansharking statute for payday lenders would open a loophole which every consumer lender could take advantage of in order to exceed the interest rates legally allowed in Indiana. In similar fact situations an injury would go unpunished, thus impermissibly narrowing the statute.

As the Court states in *IURC*, "The doctrine of legislative acquiescence is less relevant where the issue is one the legislature has addressed, rather than a need to fill a gap in the statute or interpret an ambiguity."[21] In that case the conclusion was that the language of section 83(a), the Commission's long-standing interpretation, and a previous holding of the Court precluded any change in interpretation which would give the Commission jurisdiction over a holding company unless the General Assembly itself acted to amend the Act. In contrast the language of the loansharking and consumer lending statutes, the absence of any Department interpretation that could be considered "long-standing", and the non-existence of a court holding which states otherwise leads to the conclusion that there is no legislative acquiescence where payday loans are

---

[17] *State v. Hensley*, 716 N.E.2d 71, 76-77 (Ind. Ct. App. 1999), *citing* Board of Health v. The Journal-Gazette Co., 608 N.E.2d 989, 992-93 (Ind. Ct. App. 1993).

[18] *Id.*, at 77, *citing* *Sangralea Boys Fund v. Board of Tax Comm'rs*, 686 N.E.2d 954, 959 (Ind. Tax Ct. 1997), *review denied*.

[19] *Department of Financial Intitutions v. Universal C.I.T. Credit Corp.*, 146 N.E.2d 93, 95 (Ind. 1957), *citing* *New York, C. & St. L.R.R. Co. v. Singleton*, 190 N.E. 761 (Ind. 1934); *Warren v. Indiana Telephone Co.*, 26 N.E.2d 399 (Ind. 1940); *Nash v. Meguschar*, 91 N.E.2d 361 (Ind. 1950).

[20] *Cape v. State*, 400 N.E.2d 161, 164 (Ind. 1980), *citing* *State v. Bigbee*, 292 N.E.2d 609 (Ind. 1973).

[21] *Indiana Utility Regulatory Com'n*, at 358.

concerned and such transactions are therefore not exempt from the loansharking statute.

The history of the last two legislative sessions further demonstrates that there has been no attempt whatsoever to exempt payday lenders from the supervised lender usury ceilings or the loansharking statute. In *IURC*, approximately seventy-five years passed before the Commission attempted a change in administrative interpretation on an issue where the General Assembly had already taken as much action as it deemed necessary.

In contrast, no more than six years has passed since payday lenders first entered the state and in that time **there has been only one official opinion**. This was issued on January 19, 2000 by the Attorney General in response to the Department's question regarding statutory construction and whether the supervised lender usury ceilings and loansharking statute apply to payday loans. Official Opinion No. 2000-1 answered this question affirmatively and signals **the first official opinion by any branch of state government** on this topic. The opinion was released at the beginning of the 2000 legislative session and the General Assembly was well aware of it due to the media attention and subsequent litigation that it produced. No action was taken to indicate disagreement with the opinion. No bill or statute was introduced to demonstrate disagreement with the first official opinion regarding the status of payday loans under Indiana law. Any appearance of legislative acquiescence, to the extent that anyone can determine, has been in favor of the Department and the Attorney General's Official Opinion.

IURC is about legislative acquiescence. Legislative acquiescence is not an issue with payday lenders and, therefore, this case is not an issue either. Lenders would say it is in their favor, but the response of the Department is that there has been no acquiescence one way or the other because prior to January 2000 no official position on payday loans had been taken one way or another. The Department's first position is stated in the Official Opinion released by the Attorney General, and the General Assembly did not see fit to question that opinion **in any way at all** during the only legislative session that has taken place since the Department made its **first administrative determination**.